Supreme Court, U.S.
FILED
FEB 14 2001
OFFICE OF THE CLERK

(3)

No. 00-929

In the

Supreme Court of the United States

TRANSATLANTIC SCHIFFAHRTSKONTOR GMBH,

Petitioner,

– against –

SHANGHAI FOREIGN TRADE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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REPLY BRIEF OF TRANSATLANTIC SCHIFFARTSKONTOR GMBH IN SUPPORT OF CERTIORARI

By misinterpreting Supreme Court precedent regarding the basic elements of the single most important exception to foreign state immunity under the FSIA, by creating an inter-circuit split of authority regarding an assignee's rights under the FSIA, and by not following its own prior precedent regarding the analysis of foreign judgments under the FSIA, the Second Circuit has created a critical, all encompassing need for this Court's guidance. The silence of respondent with respect to the key aspects of this petition only confirms the position of petitioner and makes the need for this Court's intervention and guidance even more apparent.

REPLY TO SFTC'S QUESTION PRESENTED

In phrasing its counter question presented, respondent omits any reference to the Second Circuit's undisputed error in imputing a "requisite U.S. Act" to the "direct effect" or third clause of the commercial activity exception of the Foreign Sovereign Immunities Act, 28 U.S.C.§1605(a)(2). It is this erroneous construction which creates a conflict between the decision herein and that of this Court in *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992), as well as all other circuit court of appeals' decisions interpreting this provision. *Cf.* petitioner's question no. 1.

To imply the absence of any connection with the United States, and thus no subject matter jurisdiction under §1605 (a)(2), SFTC also omits any reference to the requisite "direct effect" which occurred in New York as a result of its acts outside the territory of the U.S. This requisite direct effect, i.e. the failure of the contractual payments to be made to the designated New York bank, was acknowledged by both the district court, when it denied SFTC's motion to dismiss (A 40-42), and the Second Circuit when it reversed that decision. (A 6-7) *Cf.* petitioner's question no. 3(3).

Similarly, SFTC avoids any mention in its counter question presented of the undisputed, requisite "commercial activity of

the foreign state elsewhere," i.e., the twenty-one shipping contracts entered into by petitioner and VSL on behalf of SFTC. Even if one employs respondent's analysis of SFTC's breach of an alleged indemnification agreement between SFTC and its agent VSL, for the monies due under these contracts, there is still an "act [by SFTC] outside the territory of the United States [the breach of the indemnification agreement] in connection with a commercial activity of the foreign state elsewhere [the contracts] and that act causes a direct effect in the United States [failure of payments to reach the New York bank designated in the contracts.]" 28 U.S.C. §1605(a)(2) *Cf.* petitioner's question no. 3(2).

Finally, while respondent emphasizes that TASK is suing as an assignee of three default judgments obtained against SFTC in favor of VSL/Harlifax (in liquidation), respondent the fact that TASK was the real party in interest to the claims giving rise to those judgments and is thus also the beneficial owner of those claims and the related judgments it now seeks to enforce. *Cf.* petitioner's question no. 3(1).

REPLY TO SFTC'S STATEMENT OF THE CASE

Respondent states that "SFTC was not a party to, or a signatory of, any of these shipping contracts" citing the signature of VSL on the contracts. (Resp. Br. at 2) This is misleading as both the district court and the Second Circuit accepted petitioner's argument that SFTC was the disclosed principal of VSL under these contracts. (A 7, 43)

Moreover, there is nothing "inconsistent" about SFTC's duty to indemnify VSL as alleged in the Complaint. (Resp. Br. at 2) This duty was *both* implied by law as a result of the principal-agent relationship (A 69) and was an express term of the joint venture agreement between SFTC and two other entities pursuant to which VSL was formed. (A 68, ¶¶ 11, 12; A 92:1-93:40)

Despite the express language of the contracts, various bank advices, the acceptance by the Second Circuit and the district court that the payments were to be made to a contractually designated New York bank (A 87, 88, 6-7, 42), and that a

"direct effect" therefore occurred in the U.S., SFTC persists in stating that the "payment[s] w[ere] to be made to Transatlantic's bank account in Hamburg, Germany via wire transfer through a correspondent bank in New York." Nothing in the record indicates that the payments were to be transferred to Germany — only that the New York bank was to telex advise the German bank upon receipt of the funds. (A 87, 88) However, even assuming *arguendo* that the payments were to be transferred to Germany, a subsequent transfer would not negate the direct effect in New York, which occurred as the "immediate consequence" of SFTC's breach. (A 41-42, citing *Hanil Bank v. PT. Bank Negara Indonesia*, 148 F.3d 127, 133 (2d Cir. 1998); *see also, Adler v. Federal Republic of Nigeria*, 107 F.3d 720, 729 (9th Cir. 1997)).

REPLY TO SFTC'S ARGUMENT

I. SFTC DOES NOT ADDRESS THE DIRECT CONFLICT BETWEEN THE SECOND CIRCUIT'S ERRONEOUS REQUIREMENT OF "A U.S. ACT" AND THIS COURT'S "BASED UPON" ANALYSIS IN *REPUBLIC OF ARGENTINA V. WELTOVER*

Now, before *this* Court, respondent correctly cites *Republic of Argentina v. Weltover*, 504 U.S. 607, 611 (1992) and the requisite elements of §1605(a)(2). (Resp. Br. at 6). In the courts below, however, SFTC argued, and the Second Circuit adopted its contention, that the "based upon" analysis in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), governed the instant dispute. (A 7, 9) Significantly, the district court had correctly recognized in both of its decisions that *Weltover* is the governing precedent herein (A 28, 40), and in its decision on reconsideration, that *Nelson*, unlike the instant case, required commercial activity *in* the U.S. since it "involved the *first* clause of section 1605(a)(2). . . ." (A 42) (emphasis added)

Notwithstanding its currently appropriate citation of *Weltover*, respondent makes no effort in its opposition brief to reconcile *Weltover's* requirement of "an act *outside* the territory of the United States" with the Second Circuit's erroneous reliance herein upon the absence of "the requisite *U.S.* Act of

the assignor" (A 11) or, as stated in its holding shortly thereafter, "VSL's assumedly *U.S.* Acts." *(Id.)*. Respondent's deafening silence regarding this dispositive error clearly reflects SFTC's recognition of the correctness of petitioner's position.

II. THE SECOND CIRCUIT'S RELIANCE UPON TASK'S STATUS AS AN ASSIGNEE CLEARLY CONFLICTS WITH THE LAW OF THE FIFTH AND TENTH CIRCUITS AND THUS INVOLVES AN IMPORTANT QUESTION WHICH SHOULD BE RESOLVED BY THIS COURT

SFTC makes no effective response to TASK's assertion of the intercircuit conflict created by the Second Circuit's decision.[1] The Fifth Circuit in *Byrd v. Corporacion Forestal y Industrial*, 182 F.3d 380, 391 (5th Cir. 1999) expressly rejected

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[1] In attempting to deny the intercircuit conflict, SFTC makes a significant misstatement. No where in TASK's original petition did TASK state that the Second Circuit "held that assignees have no right to sue under the FSIA." (Resp. Br. at 9) TASK, more accurately, stated:

> Just prior to holding that TASK had failed to establish that its action was based upon the "requisite U.S. Act," the Second Circuit expressed its doubt that any assigned or purchased judgment could qualify as being 'based upon the requisite U.S. Act of the assignor' for purposes of a §1605(a)(2) action (A 11):
>
> > [W]e need not determine today whether every assigned, or purchased, judgment fails to meet the statutory ["based upon"] requirement. It is enough for us to say that *any* assigned or purchased judgment is unlikely to qualify as [being] "based upon" *the requisite U.S. Act* of the assignor. . . ." (Emphasis added)

(Pet. at 22 quoting the decision at A 11)

Moreover, the Second Circuit never "held ," as asserted by SFTC, that TASK "could not rely on its *own* contractual dealings with VSL as a basis for asserting jurisdiction over SFTC." (Resp. Br. at 9) Quite to the contrary, the Second Circuit (A 8) agreed with the district court (A 43) that an analysis of the conduct underlying a judgment is appropriate when ruling on the district court's jurisdiction under the FSIA.

the defendants' argument therein that the plaintiffs "*only* entered into the scene as an assignee [which] renders the relationship indirect." (emphasis added) Like the unsuccessful defendants in *Byrd*, the Second Circuit herein also erroneously reasoned that "TASK now has a claim against SFTC *only* because the VSL liquidators chose to assign to TASK these judgments rather than some other assets that would have satisfied TASK's claim . . . against VSL." (A 10) [2]

Significantly, the *Byrd* Court took particular note that the defendants "foresaw and perhaps even helped to plan the financial harms which occurred to [the plaintiffs]." 182 F.3d at 391. Similarly herein, the Hong Kong proceedings confirmed that SFTC intentionally engaged in asset stripping and liquidated its agent VSL, which halted the arbitration proceedings and forced TASK to accept an assignment of the VSL judgments. Yet, despite SFTC's well documented scheme, (CAJA at A 127-132; 136; 140-143) the Second Circuit chose to deny TASK its day in court reasoning that TASK *only* had these claims by assignment.[3]

SFTC's attempted distinction of *Southway v. Central Bank of Nigeria*, 198 F.3d 1210 (10th Cir. 1999) is no more valid

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[2] In making this erroneous assumption the Second Circuit ignored certain language in the Deed of Assignment partially quoted in note 6 of its decision (A 10), which states in reference to the liability of VSL under the contracts: "there are and/or will be insufficient funds to fully discharge the liability." (Court of Appeals Joint Appendix ("CAJA") at A 235) Thus, contrary to the Second Circuit's statement, how VSL's liquidators chose to pay TASK *was* directly related to the contracts and VSL's/SFTC's breach of them which had a direct effect in New York. (A10) Moreover, given that VSL had no other assets to satisfy TASK's claims, TASK was definitely *not* "indifferent to how this payment was to be accomplished." (*Id.*)

[3] Rather than strictly analyzing the actual facts, the Second Circuit focused instead upon hypotheticals involving theoretical payments by VSL to TASK of "pots of gold" and "bananas" which VSL "*might have* assigned to TASK." (A-10) (emphasis added) The decision also points to hypothetical judgments which VSL *might have* assigned to TASK which, if assigned, would have had "nothing to do with the United States." *Id.*

than its attempted distinction of *Byrd*. Respondent asserts that in *Byrd* and in *Southway*, there were acts which caused a direct effect in the United States which are allegedly absent herein. (Resp. Br. at 9-10) As discussed above, the district court found both the requisite act outside the United States and the direct effect in this country present. (A 40-42) The Second Circuit acknowledged the direct effect herein (A 7), but found no "requisite *U.S. Act.*" (A 11) Petitioner agrees that there was no U.S. Act, but respectfully disagrees that one is required under the third clause of this exception.

The decision of the Second Circuit poses a threat to the goal of uniformity of federal jurisdiction under the FSIA. If assignees are to be denied an equal right to bring actions under the third clause of the commercial activity exception, it should be a uniform denial across the nation sanctioned by this Court - not one which exists only in the Second Circuit.[4]

The potential confusion arising from the Second Circuit's erroneous jurisdictional analysis of the third clause of this most important exception to foreign sovereign immunity, along with the significant impact of the lower court's decision on the access of future FSIA litigants to the federal courts in the Second Circuit, warrants a full review of this decision by this Court.

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[4] Other circuits have recognized an assignee's right to enforce a cause of action arising under various federal statutes where the assignment agreement expressly includes the legal claim or cause of action. *See*, *Lerman v. Joyce International, Inc.*, 10 F.3d 106, 112-113 (3d Cir. 1993) (RICO claim); *Gulfstream III Assoc., Inc. v. Gulfstream Aerospace Corp. et al.*, 995 F.2d 425, 440 (3d Cir. 1993) (antitrust claim); *Texas Life, Accident, Health & Hospital Service Ins. Guaranty Assoc. v. Gaylord Entertainment Co.*, 105 F.3d 210, 218 (5th Cir. 1997) (ERISA breach of fiduciary duty claim).

The Deed of Assignment between VSL/Harlifax Ltd. and TASK expressly assigns "all judgments, causes of action . . . to TASK. . . ." (CAJA at A 236).

III. RESPONDENT DOES NOT ADDRESS THE INTRA-CIRCUIT CONFLICT CREATED BETWEEN THE SECOND CIRCUIT'S DECISION HEREIN AND ITS PRIOR DECISION IN *INTERNATIONAL HOUSING*

While the Second Circuit recognized that in *International Housing Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8 (2d Cir. 1989), the Court of Appeals examined the conduct underlying a foreign judgment to determine whether jurisdiction existed (A 8), it failed to reconcile the fact that there was no U.S. Act. required by the court's analysis there. The Second Circuit did not find subject matter jurisdiction in *International Housing*, a suit to enforce a default judgment entered in the Bahamas, simply because payment in New York City was not a contractual requirement. *Id.* at 11. Had the contract there called for payment to be made to a U.S. bank, the court would have found jurisdiction even though, as in *Weltover*, the only connection with the United States was that money which should have been paid to a U.S. bank failed to arrive here. Thus the Second Circuit's decision herein cannot be reconciled with its prior decision in *International Housing* and creates an intra-circuit conflict. While admittedly not as significant as that created by the decision's inconsistency with this Court's decision in *Weltover*, or the inconsistency of its reasoning with the decisions of the Fifth and Tenth Circuit Courts of Appeals as discussed above, this intracircuit conflict demonstrates still another reason why this petition should be granted.

IV. A GRANT OF CERTIORARI IS IN KEEPING WITH THIS COURT'S PRIME RESPONSIBILITY FOR THE PROPER FUNCTIONING OF THE FEDERAL JUDICIARY AND WILL DISCOURAGE FUTURE ATTEMPTS TO CIRCUMVENT THE FSIA.

The responsibility for the proper functioning of the federal judiciary rests upon the United States Supreme Court. Aside from its erroneous jurisdictional analysis of the third clause of §1605(a)(2), the Second Circuit's decision reflects an

express reluctance to determine a "sensitive question" which may have "significant impact on U.S. foreign relations" (A 8). Given that such a concern is more properly one for the legislature when it enacts statutory provisions, *see Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 828, 106 S.Ct. 3229, 3242 (1986), it is the duty of the courts to decide such questions in accordance with the legislative intent until the legislature modifies the existing law.

SFTC's attempt to defraud petitioner out of monies due it under the contracts is abundantly supported. Respondent has also admitted in ancillary court proceedings that this case is of utmost importance since it will guide the way it structures its future transactions. This concern was reflected in its initial brief to the Second Circuit wherein SFTC argued, despite the admitted principal-agent relationship with VSL, that each agent/instrumentality of a foreign government should be treated as a distinct foreign state. (SFTC Br. at 31-32) As stated by SFTC therein, "[a]ny other rule would cripple the ability of governments to set up corporate instrumentalities, by causing uncertainty as the liability of such instrumentalities. . . ." *Id.* at 32. It is thus clear that the facts herein are neither "unusual", "unique" nor "uncommon" as SFTC suggests. (Resp. Br. at 5, 10) It is respectfully submitted that if certiorari is not granted herein, it will encourage the use of temporary corporate agents to avoid liability for the private acts of sovereign governments. What happened here was *not* a first and will be repeated again and again absent a full review by this Court.

CONCLUSION

For all the foregoing reasons, as well as those raised in the original petition, this Petition for Writ of Certiorari should be granted.

Dated: New York, New York
February 12, 2001

Respectfully submitted,

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